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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALFRED AWANI, Plaintiff and Appellant, v. NATIONSTAR MORTGAGE LLC et al., Defendants and Respondents.	B282732 Los Angeles County Super. Ct. No. PC055435

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Alfred Awani, in pro. per., for Plaintiff and Appellant.

Hall Griffin, Howard D. Hall, and Taylor R. Dalton for Defendants and Respondents.

INTRODUCTION

Plaintiff sued U.S. Bank, N.A., the beneficiary under the deed of trust on his residence, and Nationstar Mortgage LLC, his loan servicer, for multiple claims stemming from foreclosure proceedings that defendants ultimately aborted. The trial court granted defendants' motion for summary judgment, concluding defendants met their burden of demonstrating plaintiff could not establish one or more elements of his claims and plaintiff failed to submit admissible evidence raising a triable issue of material fact in opposition. We affirm.

FACTS AND PROCEDURAL BACKGROUND

We draw the facts primarily from defendants' separate statement of undisputed facts and supporting evidence, which plaintiff either conceded or failed to effectively counter with admissible evidence. (See, e.g., *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 340, fn. 1; *R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 151, fn. 3.) To the extent plaintiff offered additional or competing facts on a material issue, we state the evidence the trial court admitted in the light most favorable to plaintiff, as the nonmoving party, in accordance with the applicable standard of review for summary judgments. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

1. *The Loan, Default on First Modification, and Request for Second Modification*

In January 2007, plaintiff and his wife obtained a $1,158,500 loan from Countrywide Bank, N.A., secured by a deed of trust on their residence. Plaintiff and his wife also obtained a second mortgage from Countrywide for $331,000.

In February 2010, plaintiff sought and obtained a loan modification from Bank of America, N.A. (BANA), his loan servicer at the time, based on a claim of hardship and inability to make his monthly mortgage payments. In August 2011, Countrywide assigned the first deed of trust to BANA.

In October 2011, BANA recorded a notice of default on plaintiff's residence, declaring a default of over $80,000 on plaintiff's modified loan obligations. Plaintiff requested a second loan modification from BANA and submitted financial documents to its loss mitigation department throughout 2011 and into early-2012. In mid-2012, plaintiff filed a lawsuit against BANA because, according to plaintiff, BANA "never reached a final or any decision re[garding] the loan modification." He dismissed the lawsuit later that year, after BANA's counsel indicated that if he "dropped the action [BANA] would seriously review [his loan] for a permanent modification."

From 2012 to 2013, BANA communicated with plaintiff's attorney, Richard Hofman, about the documents it needed to complete plaintiff's application and assess plaintiff's loan for a modification.

On July 1, 2013, BANA transferred the servicing of plaintiff's loan to Nationstar. At the time of the transfer, BANA's servicing notes indicated that it had not received a complete modification package from plaintiff. Nationstar assigned plaintiff a single point of contact to answer questions, and plaintiff authorized Nationstar to speak with his attorney, Hofman, about the loan.

On October 15, 2013, Nationstar informed plaintiff that his request for a loan modification had been denied because, among other things, the unpaid principal balance on the loan did not

meet the guidelines for a modification under the federal Home Affordable Modification Program (HAMP). Nationstar advised plaintiff, through Hofman, that he could apply for a temporary interest-only modification, but plaintiff would need to complete a financial worksheet and update his income and expense information to move forward. On November 20, 2013, Nationstar again advised Hofman that plaintiff's loan could be considered for a modification only if plaintiff submitted updated financial information.

2. *The Foreclosure Proceedings*

On November 19, 2013, BANA assigned all beneficial interest under the deed of trust to U.S. Bank.

On December 2, 2013, Nationstar completed its foreclosure review, having not received plaintiff's updated financial information. On December 5, 2013, Nationstar had the property inspected in advance of a trustee's sale.

Following the inspection, Hofman contacted Nationstar several times on plaintiff's behalf, urging that plaintiff had submitted the requested financial information. Nationstar responded that it had no record of receiving the information, and requested that Hofman provide evidence to show he sent the documents to Nationstar before December 2, 2013, when the foreclosure review was completed. Absent such evidence, Nationstar advised Hofman that paying the loan reinstatement amount of $261,799.51 was plaintiff's only option to avoid foreclosure.

On December 17, 2013, the trustee under plaintiff's deed of trust recorded a notice of trustee's sale on the property. The notice set a sale date of January 9, 2014, and stated the loan had a total unpaid balance of $1,538,297.74.

3. *The Complaint and Bankruptcy Petition*

On January 6, 2014, plaintiff filed his initial complaint in this action. And, on January 8, 2014, plaintiff filed a bankruptcy petition under chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1107-1174). The scheduled trustee's sale did not occur.

On September 1, 2015, plaintiff filed his operative third amended complaint against Nationstar, asserting seven causes of action for (1) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200; the UCL); (2) estoppel; (3) violation of the Homeowner Bill of Rights (Civ. Code, §§ 2923.6, 2923.7; the HBOR); (4) negligence; (5) unfair business practices; (6) violation of the Unruh Civil Rights Act (Civ. Code, § 51; the Unruh Act); and (7) breach of oral contract. And, on December 14, 2015, plaintiff filed a complaint against U.S. Bank asserting four causes of action for (1) violation of the UCL; (2) estoppel; (3) violation of the HBOR; and (4) violation of the Unruh Act. On April 26, 2016, the trial court consolidated the two cases.

In October 2015, plaintiff dismissed the bankruptcy without a discharge. He then submitted a new loan modification application to Nationstar, while continuing to actively litigate this case. On August 2, 2016, Nationstar offered plaintiff a new loan modification agreement, after eight months of requesting missing documents from plaintiff to complete his application. Plaintiff accepted and executed the modification agreement.[1]

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[1] When defendants brought their motion for summary judgment, plaintiff had not yet accepted or rejected the offered loan modification. However, in his declaration opposing the motion, plaintiff acknowledged that he eventually accepted the modification, although he asserted the modification was "unconscionable" and he was "coerced into signing" it. Because

4. *Defendants' Motion for Summary Judgment*

On August 17, 2016, defendants filed their motion for summary judgment. With respect to the estoppel claim, defendants argued plaintiff had pled only that BANA made a vague promise to offer him a loan modification on certain conditions, and it was undisputed that Nationstar and U.S. Bank neither made such a promise nor that they expressly or implicitly assumed liability for BANA's alleged promise as its successors in interest. Defendants also argued plaintiff had no evidence to show he reasonably and detrimentally relied on BANA's alleged promise.

As for the HBOR claim, defendants argued plaintiff could not establish a statutory violation because it was undisputed that Nationstar appointed a single point of contact and that plaintiff had not submitted a complete application for a loan modification when defendants initiated foreclosure proceedings. Additionally, defendants argued plaintiff was precluded from recovering

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the purported unconscionability of the August 2016 modification was not a basis for any of the claims pled in the complaint, plaintiff's assertions are irrelevant to our review of the judgment in this case. (See *Hutton v. Fidelity National Title Co*. (2013) 213 Cal.App.4th 486, 493 ["the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings"]; *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.) For the same reason, we also will not consider plaintiff's assertions regarding the purported terms of BANA's settlement of litigation with several states attorneys general.

damages under the HBOR because it was undisputed that a trustee's sale had not occurred.

Defendants maintained plaintiff's remaining claims were likewise defective. Regarding the negligence and breach of oral contract claims, defendants argued plaintiff could not establish liability because, as a matter of law, a loan servicer does not owe a borrower a common law duty of care beyond the duties that the parties' written loan agreement establishes. Additionally, defendants maintained the statute of frauds barred the breach of oral contract claim. As for the Unruh Act claim, defendants argued plaintiff could not show the decision to foreclose on his home was motivated by racial animus because it was undisputed that plaintiff defaulted on his $1.1 million mortgage. Finally, defendants argued the UCL cause of action was derivative of plaintiff's other defective claims and, in any event, plaintiff lacked standing to assert a UCL violation because he could not show he lost money or property as a result of defendants' alleged conduct.

5. *Plaintiff's Motion to Compel, Summary Judgment Opposition, Requests for Continuance, and Motion to Be Relieved as Counsel*

After defendants filed their summary judgment motion, plaintiff filed a motion to compel the depositions of three Nationstar employees. Defendants opposed the motion.

On October 17, 2016, while the motion to compel was pending, plaintiff filed his opposition to summary judgment, together with his supporting declaration and the declaration of his attorney, Hofman. In his declaration, plaintiff acknowledged defaulting on the modified loan in 2010, but claimed a BANA representative directed him to do so before he could be considered

for a second modification. He likewise acknowledged that BANA and later Nationstar appointed a single point of contact to work with him on the modification application, but asserted that "Nationstar changed single points of contact too frequently" and that an unnamed single point of contact "did not have the skill or expertise to do anything to further my loan modification request." From 2011 to 2013, plaintiff provided BANA with the financial documentation it requested; however, he acknowledged BANA never confirmed his application was complete, asserting the bank "kept on asking for new documents." He also declared that, "[a]t no point prior to July 2013," when BANA transferred servicing rights to Nationstar, "did [BANA] make a final determination that I did not qualify for a final permanent loan modification."

Concerning BANA's purported promise, plaintiff declared that he "understood" from correspondence between BANA and his attorney that "if I did show [a] small amount of additional income per month, that [BANA] would provide me a permanent loan modification at the current market interest rate." He stated the "only way that I could generate that extra income . . . was to take early retirement from my employer [Boeing] and to start and draw early on my pension." He declared that BANA "was advised" of this plan and that the retirement would be "permanent." As a result of retiring "[five] years earlier than planned," plaintiff asserted his "retirement benefit [had] been reduced."

Plaintiff declared that he did "not recall specifically receiving" Nationstar's October 15, 2013 letter notifying him that his application for a loan modification had been rejected. He nonetheless acknowledged that, in November 2013, he was told to submit new loan modification documents to Nationstar. He

ultimately submitted a complete loan modification application to Nationstar on December 5, 2013.

Plaintiff said he learned in "mid to late December 2013, from a flyer" sent to his house, that Nationstar had scheduled a trustee's sale for January 9, 2014. He asserted Nationstar "failed to provide me even 20 days" to cure the default and, as a result, he was forced to file for bankruptcy to keep his home. During the bankruptcy, he paid Nationstar $6,706.98 per month on his mortgage, totaling $133,231.23 when the bankruptcy was dismissed. Despite proposing "multiple" plans to "pay Nationstar in full," plaintiff said Nationstar refused to vote on the plans to discharge the bankruptcy. Plaintiff maintained Nationstar's conduct was "driven by racial animus" on account of his family being "the first and only [B]lack individuals living in our area."

Hofman corroborated plaintiff's account of the communications with BANA and Nationstar regarding the request and submission of financial documents. He also questioned the accuracy of defendants' evidence, pointing out purported discrepancies in Nationstar's record of its communications with plaintiff and Hofman.

On October 24, 2016, the trial court granted plaintiff's motion to compel the depositions of three Nationstar employees. Two days later, plaintiff requested a continuance of the summary judgment hearing to allow him time to take the depositions. The trial court granted the continuance to December 19, 2016, and gave the parties permission to file a supplemental opposition and reply based on the new hearing date.

On November 8, 2016, plaintiff filed a second request to continue the summary judgment hearing. The court granted the request, continuing the hearing to March 3, 2017.

On December 23, 2016, plaintiff's attorney filed a motion to be relieved as counsel, citing a disagreement with plaintiff regarding a material matter related to his continuing representation. Defendants did not oppose the motion, but raised concerns that the requested relief might be used as a predicate for another continuance of the summary judgment hearing, which defendants expressly opposed. On January 25, 2017, the trial court granted the motion to relieve Hofman as plaintiff's counsel.

On February 10, 2017, the trial court, on its own motion, continued the summary judgment hearing to March 9, 2017. The order specified that the deadlines for filing plaintiff's supplemental opposition and defendants' reply were to be calculated based on the new hearing date.

On February 17, 2017, plaintiff filed his supplemental opposition to the summary judgment motion, making substantively the same arguments as the original opposition.

Concurrent with his opposition, plaintiff filed his third request for continuance of the summary judgment hearing, citing the departure of his former attorney and his pro. per. status as grounds for relief. The trial court denied the request, concluding plaintiff failed to explain why he did not have sufficient time to prepare for the hearing since receiving his former attorney's motion to be relieved as counsel in December 2016.

6. *The Order Granting Summary Judgment*

On March 9, 2017, the trial court granted defendants' motion for summary judgment, concluding that defendants made a prima facie showing that plaintiff's claims were either legally barred or that plaintiff could not establish one or more essential elements of the claims, and that plaintiff failed to respond with

admissible evidence raising a triable issue of disputed fact. The court entered judgment and plaintiff timely appealed.

DISCUSSION

1. *The Trial Court Reasonably Exercised Its Discretion to Deny Plaintiff Another Continuance*

Regardless of the merits of the court's summary judgment ruling, plaintiff argues the judgment must be reversed because the court denied his request for a continuance after relieving his former attorney as counsel. We find no abuse of discretion in the court's ruling.

Code of Civil Procedure section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." The Legislature added subdivision (h) to section 437c " ' "[t]o mitigate summary judgment's harshness," . . . [Citations]' [citation] 'for an opposing party who has not had an opportunity to marshal the evidence[.]' [Citation.] The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of [plaintiff's]

request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)

Plaintiff did not assert in his request for continuance, let alone attempt to show, that he had been denied on opportunity to obtain evidence necessary to oppose defendants' summary judgment motion. Rather, he argued a continuance was warranted due to the "recent departure" of his attorney and to allow him "additional time to adequately review all of the new deposition transcripts and [to] incorporate the evidence and testimony into the opposition issues as applicable." That bare request for more time falls far short of the showing required to mandate a continuance under Code of Civil Procedure section 437c, subdivision (h). (See *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 ["It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.' "].)

As for whether the court abused its discretion, it is settled that a "reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " (*Ibid.*; *Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 (*Mahoney*).)

Generally, a " 'showing of good cause' " is required to support a request for continuance. (*Mahoney, supra,* 223 Cal.App.3d at pp. 170-171 [applying continuance requirements under former rule 375 of the California Rules of Court to request for discretionary continuance of a summary judgment hearing].) Here, the trial court reasonably concluded that plaintiff failed to make such a showing. As the court observed, plaintiff's continuance request made no attempt to "explain why [plaintiff] did not have sufficient time to review [deposition] transcripts since the time he was served with his former counsel's motion to be relieved as counsel" more than three months earlier. Given the series of earlier continuances that the court had already granted, we cannot say the court abused its discretion when it denied plaintiff's request for a fourth continuance that lacked this critical explanation. (See *Mahoney,* at pp. 171-172 [where plaintiff had already received a two-week continuance of summary judgment hearing, departure of one of the lawyers who had worked on his case four months earlier and recent illness of another lawyer was insufficient to establish "good cause" for continuance].)

2. *Summary Judgment Standard of Review*

A motion for summary judgment or summary adjudication is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 582 (*Soria*).) "We review a grant of summary judgment or summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party or a

determination a cause of action has no merit as a matter of law. [Citations.] The evidence must be viewed in the light most favorable to the nonmoving party." (*Soria,* at p. 582.)

"When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to ' "show[ ] that one or more elements of the cause of action . . . cannot be established" by the plaintiff.' " (*Soria, supra,* 5 Cal.App.5th at p. 582, quoting *Aguilar, supra,* 25 Cal.4th at p. 853; see Code Civ. Proc., § 437c, subd. (p)(2).) " ' " 'The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish," ' the elements of his or her cause of action." ' " (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 ["the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence' "]; *Soria,* at pp. 582-583.)

"Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action." (*Soria, supra,* 5 Cal.App.5th at p. 583, citing Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra,* 25 Cal.4th at p. 850.) "On appeal

from an order granting summary judgment, '[the] reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party.' " (*Soria,* at p. 583.) "[S]ummary judgment cannot be granted when the facts are susceptible of more than one reasonable inference." (*Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392.)

Although our review is de novo, "the appellant [still] has the burden of showing error, even if he did not bear the burden in the trial court." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230; *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1140.) "The fact that we review de novo a grant of summary judgment does not mean that the trial court is a potted plant in that process." (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791.) "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116; *Claudio,* at p. 230.)

While we are sympathetic to the challenges facing plaintiff as a pro. per., the fact that he is representing himself does not diminish his burden to establish error on appeal. The law permits a party to act as his own attorney, however, " '[s]uch a party is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and

attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

With these principles in mind, we turn to the merits of the trial court's summary judgment ruling.

3. *Plaintiff Cannot Establish His Estoppel Claim Because There Is No Evidence of a Clear and Unambiguous Promise*

" 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." ' " (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672; *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*).)

" '[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . .' [Citation.] The promise must, in addition, be 'clear and unambiguous in its terms.' " (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044 (*Garcia*).) "To be enforceable, a promise [must] be ' "definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." ' " (*Id.* at p. 1045.) When " ' "a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether

those agreed obligations have been breached, there is no contract." ' " (*Ibid.*; *Aceves, supra,* 192 Cal.App.4th at p. 226.)

In his declaration opposing summary judgment, plaintiff stated that he "understood" from communications between BANA and his attorney that "if I did show [a] small amount of additional income per month, that [BANA] would provide me a permanent loan modification at the current market interest rate." Plaintiff's declared understanding is insufficient to establish the sort of clear and unambiguous promise that is necessary to support a promissory estoppel claim. *Aceves* is instructive on this point. After falling behind on her monthly mortgage payments, the plaintiff in *Aceves* filed for bankruptcy protection under chapter 7 of the Bankruptcy Code. (*Aceves, supra,* 192 Cal.App.4th at p. 223.) Although she had intended to convert the bankruptcy to a chapter 13 proceeding, she declined to do so, after her lender, the defendant bank, promised to work with her on a loan reinstatement and modification if she would not oppose its motion to lift the bankruptcy stay. (*Ibid.*) The plaintiff kept her end of the bargain, but the bank still sold her home at a trustee's sale without ever negotiating with her for the reinstatement and modification of her loan. (*Ibid.*) In reversing a judgment dismissing the plaintiff's promissory estoppel claim, the *Aceves* court concluded the promise was "sufficiently concrete to be enforceable" (*id.* at p. 222), observing: "[The bank] agreed to 'work with [the plaintiff] on a mortgage reinstatement and loan modification' *if she no longer pursued relief in the bankruptcy court*." (*Id.* at p. 226, italics added.)

Unlike the promise in *Aceves*, plaintiff's second-hand understanding of what BANA communicated to his lawyer about a potential modification is too ambiguous to serve as the basis for

a promissory estoppel claim. Critically, there is no way to know from plaintiff's declaration what dollar figure constituted the "small amount of additional income per month" that he was required to show to qualify for the supposedly promised modification, nor could a fact finder determine from plaintiff's evidence whether he in fact came up with sufficient additional income to meet the required modification guidelines. On the contrary, the only evidence we have on this point is plaintiff's admission that BANA continued to ask for additional financial information, even after plaintiff took an early retirement to generate additional income, and Nationstar's October 15, 2013 letter informing plaintiff that his loan did not meet the guidelines for a HAMP modification. Unlike *Aceves*, where it was clear that the bank breached its promise after the plaintiff took no action to oppose lifting the bankruptcy stay (see *Aceves, supra,* 192 Cal.App.4th at p. 226), here, plaintiff has failed to offer evidence of a promise definite enough that a fact finder could determine "what obligations the parties have agreed to, and . . . whether those agreed obligations have been breached." (*Garcia, supra,* 183 Cal.App.4th at p. 1045.)

4. *Plaintiff Cannot Establish a Claim for Violation of the HBOR Because It Is Undisputed that No Trustee's Sale Has Occurred and Defendants Offered Him a Loan Modification that He Accepted*

Plaintiff contends he presented sufficient evidence to establish a claim for dual tracking in violation of the HBOR based upon Nationstar recording a notice of trustee's sale on December 17, 2013, after he submitted a purportedly complete loan modification application on December 5, 2013. We need not address whether plaintiff's evidence was sufficient to raise a

triable issue of fact as to the claimed HBOR violation, because it is undisputed that no trustee's sale ultimately occurred and, therefore, plaintiff has no basis for relief under the statute.

The HBOR "was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' [Citation.] Among other things, HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

During the relevant period, former Civil Code section 2923.6, subdivision (c) provided, "[i]f a borrower submits a complete application for a first lien loan modification," the foreclosing entity "shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending," unless the borrower is provided with a written determination regarding his application and the time for an appeal (30 days) has expired.[2] (Former § 2923.6, subds. (c) & (c)(1); see also former § 2923.6, subd. (d).)

Also during the relevant period, former section 2924.12, subdivision (a)(1) provided: "If a trustee's deed upon sale has not

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[2] We apply the versions of the HBOR statutes that were in effect in December 2013, when the alleged statutory violations occurred. (See Stats. 2012, ch. 87, § 7, eff. Jan. 1, 2013.) Further statutory references are to the Civil Code, unless otherwise indicated.

been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . . 2923.6" and other enumerated sections of the HBOR. And, former section 2924.12, subdivision (c) stated: "A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent *shall not be liable* for any violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale." (Italics added.)[3]

It is undisputed that defendants did not sell plaintiff's residence at a trustee's sale and that defendants have not recorded a trustee's deed upon sale on the property. It is also undisputed that since the supposed conduct that purportedly violated the HBOR, defendants offered, and plaintiff accepted, a new loan modification. In view of these undisputed facts, defendants cannot be held liable for the HBOR violations plaintiff alleges in the complaint.[4] (See former § 2924.12, subd. (c).)

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[3] Actual economic damages are available for a "material violation" of the HBOR under former section 2924.12, subdivision (b), only "[a]fter a trustee's deed upon sale has been recorded."

[4] Former section 2924.12, subdivision (c) also provides a safe harbor for purported violations of the single point of contact mandate under former section 2923.7. Thus, to the extent plaintiff's HBOR claim is based upon his assertion that "Nationstar changed single points of contact too frequently" and that an unnamed single point of contact "did not have the skill or expertise to do anything to further my loan modification request," the claim is also barred under former section 2924.12, subdivision (c).

5. *Plaintiff Cannot Establish a Claim for Negligence Because Defendants Did Not Owe Him a Common Law Duty of Care Concerning His Loan*

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) "The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095 (*Nymark*).) "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278.)

Plaintiff argues that in succeeding to BANA's loan servicing rights, Nationstar assumed a duty to "offer Plaintiff a full and permanent loan modification at market [*sic*] and principal reduction." The argument is contrary to established law. As the court explained in *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. A lender's obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental or quasi-governmental agencies." (*Id.* at p. 67.) " '[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan

transaction does not exceed the scope of its conventional role as a mere lender of money.' " (*Id.* at p. 63, quoting *Nymark, supra,* 231 Cal.App.3d at p. 1096.) Thus, lending institutions do not have a common law duty of care to offer, consider, or approve a loan modification, or to offer [borrowers] alternatives to foreclosure." (*Lueras,* at p. 68.) This rule applies to this case, and bars plaintiff's common law negligence claim as a matter of law. (See, e.g., *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 207-208 [borrower could not establish negligence claim based on lender's purported advice to miss a loan payment to be considered for a modification, explaining "[t]he undisputed facts established there was no relationship between [the borrower] and [the lender] giving rise to a duty the breach of which would permit [the borrower] to recover emotional distress damages based on negligence"].)

6. *The Statute of Frauds Bars Plaintiff's Claim for Breach of Oral Contract*

In his operative complaint, plaintiff alleged that Nationstar breached an oral agreement to "undertake a full, fair and complete review of Plaintiff for a final loan modification and agreed not to undertake any foreclosure action during the review." It is settled, however, that an agreement to modify a mortgage loan must be in writing and signed by the party to be charged, otherwise it is not enforceable under California's statute of frauds. (See §§ 1624, subd. (a)(3) & 1698, subd. (a).) Because the alleged oral contract would change the terms of plaintiff's deed of trust and loan agreement, the statute of frauds bars plaintiff's claim as a matter of law. (See *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 553 [lender's agreement to forbear foreclosure rights under

deed of trust is a contract modification subject to statute of frauds].)

7. *Plaintiff Cannot Establish an Unruh Act Violation Because There Is No Evidence that Defendants' Actions Were Based on Plaintiff's Race*

The Unruh Act prohibits discrimination by business establishments based on "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status." (§ 51, subd. (b).) But the prohibition extends to only unreasonable, arbitrary or invidious discrimination that is not within a legitimate business interest, while permitting, for instance, a "policy of selection based on financial criteria, so long as the policy is applicable alike to all persons regardless of race, color, sex, religion, etc." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155 (*Harris*); see also *Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1450.) The question of whether a legitimate business interest exists and whether a challenged practice bears a reasonable relationship to that interest may be resolved as a matter of law. (See *Harris,* at p. 1165 ["Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public."].)

Defendants' evidence was sufficient to make a prima facie showing that they had a legitimate business interest in proceeding with a foreclosure that they hoped would recoup a portion of the over $1 million in funds loaned to plaintiff.

In response, plaintiff offered his declaration, wherein he asserted that "[i]t appears clear that Nationstar's actions have been driven by racial animus," noting that he was "aware of anecdotal claims of racial discrimination in the housing industry" and that he and his family are "the first and only [B]lack individuals living in our area." He then recounted his grievances with Nationstar's actions during the bankruptcy and loan modification interactions, which he declared "only could be based on their racial animus towards Black people like my family and I."

Plaintiff's declaration was insufficient to create a triable issue of fact because his assertions—based on assumption and anecdote—amounted to no more than speculation that his and his family's race motivated defendants' decision to pursue foreclosure as a means of recovering funds on the defaulted loan. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718 (*Martin*) is instructive. In that case, the plaintiff sued her employer for age discrimination in violation of the Fair Employment and Housing Act. (*Martin*, at pp. 1723, 1730.) The employer moved for summary judgment based on evidence showing that "due to cutbacks in government contract spending it had needed to reduce the size of its active workforce 'drastically' " and that its "weighted evaluation procedure"—based on performance and seniority—dictated the plaintiff's layoff. (*Id.* at pp. 1731-1732.) The plaintiff responded with evidence showing that her job performance had been satisfactory and that, several years before the cutbacks, the employer had made statements in internal memoranda suggesting a preference for retaining younger employees over older ones. (*Id.* at pp. 1733-1735.) The *Martin* court affirmed the summary judgment, concluding the plaintiff's evidence was "insufficient to create more than

speculation that [the employer's] showing was pretextual or false." (*Id.* at p. 1735.) The court explained that "economically dictated reductions in force can and often do victimize highly qualified and hard-working people, but the question germane to such a person's claim for wrongful discharge is, simply, whether the procedure by which he or she was laid off was validly and fairly devised and administered to serve a *legitimate business purpose*." (*Id.* at p. 1733, italics added.) Because the plaintiff's evidence concerned statements made before the cutbacks in government contracts that occasioned the workforce reduction, the court reasoned it would be speculative to conclude age discrimination motivated the layoff decision, given the employer's apparent adherence to its age-neutral weighted evaluation procedure. (*Id.* at pp. 1734-1735.)

For reasons similar to those set forth in *Martin*, we conclude plaintiff's assertions of racial animus are insufficient to raise a triable issue of fact. Because the act of exercising the power of sale under plaintiff's deed of trust, on its face, "bears a reasonable relation to commercial objectives appropriate to [defendants' lending] enterprise" (*Harris, supra,* 52 Cal.3d at p. 1165), plaintiff had the burden to produce substantial responsive evidence showing that his race was in fact the reason for defendants' decisions concerning his bankruptcy plans and loan modification applications (see *Martin, supra,* 29 Cal.App.4th at pp. 1734-1735). Plaintiff's bald claim that his proffered bankruptcy plan "would fully payoff the full default"—unsupported by any other terms of the plan, such as its interest rate or duration—was insufficient to create more than speculation that defendants' position in the bankruptcy proceeding was racially motivated. (See *ibid.*) And plaintiff's

admission that defendants offered him a loan modification, which he accepted, after receiving his long-belated financial information, convincingly undermines his assertion that defendants' actions had been dictated by the fact that his family is the first and only Black family in his neighborhood. The trial court did not err in concluding plaintiff failed produce admissible evidence of racial discrimination to support his Unruh Act claim.

8. *Plaintiff Cannot Establish a UCL Violation Because the Undisputed Facts Establish Defendants Cannot Be Held Liable for Violating the HBOR*

In order "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949), the "UCL prohibits, and provides civil remedies for, unfair competition." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) "Unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) A plaintiff may pursue a UCL action in order to obtain either (1) injunctive relief, or (2) restitution " 'as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.' " (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319.)

"Although the [UCL's] scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that

determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general [UCL] to assault that harbor." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 (*Cel-Tech*).) "A plaintiff may thus not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' " (*Ibid.*) "[A] plaintiff may not bring an action under the [UCL] if some other provision [of law] bars it." (*Id.* at p. 184.)

Plaintiff contends defendants' purported violations of the HBOR—the supposed dual tracking and recording of a notice of trustee sale that occurred in 2013—"forced" him to file for bankruptcy, thereby causing him to "incur thousands of dollars of costs" and to lose future employment opportunities as a result of defendants' alleged unfair business practice. However, as we have discussed, at the time the alleged dual tracking occurred, the HBOR provided a safe harbor for trust beneficiaries and mortgage servicers in cases where a purported violation had been "corrected and remedied prior to the recordation of a trustee's deed upon sale." (Former § 2924.12, subd. (c); see also current § 2924.12, subd. (c) [providing same safe harbor as under 2013 version of statute: "A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent *shall not be liable for any violation* that it has corrected and remedied prior to the recordation of the trustee's deed upon sale" (italics added)].) Defendants did not conduct a trustee's sale, and they offered plaintiff a loan modification (notwithstanding his bankruptcy and the current litigation), which plaintiff admits he accepted. In view of the HBOR's safe harbor provision, plaintiff cannot recast his dual tracking allegations as an unfair competition claim to create liability that the HBOR specifically eliminates.

(*Cel-Tech, supra,* 20 Cal.4th at pp. 182-184; see also *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1115, 1125 [affirming summary judgment, observing "[s]ection 2924.12, subdivision (c), provides a safe harbor by encouraging the curing of violations," and holding plaintiffs could not maintain UCL claim premised on alleged HBOR violations that had been cured].)

DISPOSITION

The judgment is affirmed. U.S. Bank and Nationstar are entitled to costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.